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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 872.

INTERNATIONAL TERMINAL OPERATING CO. INC.,
successor to THE JARKA CORPORATION,
Petitioner,

against

IINO KAIUN KAISHA, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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In this indemnity action, Iino Kaiun Kaisha, Ltd. (hereinafter referred to as the Shipowner) recovered a judgment of $6,500 against International Terminal Operating Co. Inc., successor to The Jarka Corporation (hereinafter referred to as the Stevedore), after a trial before a judge and jury. The judgment entered upon the decision of the jury was affirmed by the Court of Appeals for the Second Circuit, reported in 251 F. 2d 928.

The judgment represented the amount of a settlement paid by the Shipowner to one Dante Parenzan, a longshoreman employed by the Stevedore, who had sued the Shipowner for damages for an injury sustained on November

24, 1952, while working on the Shipowner's vessel, the SS. *Tomishima Maru.*

The Stevedore was impleaded in Parenzan's action, and, thereafter, Parenzan's action was settled and severed from the present claim.

The only issue raised by the Stevedore at the trial was whether or not there was proof that the Stevedore was negligent. The Stevedore did not raise the issue of the negligence of the Shipowner; nor if the Shipowner was negligent, the character of the Shipowner's negligence compared with the Stevedore; and did not ask the court to go to the jury on those issues (42).*

The facts, as contained in the opinion of the Court of Appeals for the Second Circuit, are not challenged by petitioner Petitioner does, however, argue that there are other "facts" which are not supported by the record. It says, for example, on page 4 of the petition, that the ship was loaded in Japan by the respondent or its agent and, again on pages 7, 8, 9, 11 and 13, that it was the Shipowner which created the hazard resulting from improper dunnage. The record does not support these asserted "facts" and the court should not be influenced by argument of counsel conjured up from partial excerpts from the testimony and tied together by theories of counsel which, of course, are not a substitute for testimony. The record fully substantiated the findings made by the jury. Briefly, the findings made and the evidence in support of each finding are as follows:

1. Parenzan's accident was caused by defective or unfit dunnage.

Parenzan testified that the accident occurred when he stepped on a case and the dunnage broke (26).

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* References are to pages of Appendix to Brief of Third Party Defendant-Appellant filed in the court below.

2. The Stevedore, through its hatch boss, DiCostanzo, knew as the unloading progressed from 8:30 a. m. to 10:00 a. m., that defective or unfit dunnage had been used.

Hatch boss DiCostanzo admitted that he saw dunnage crack, break and give way prior to the accident (35, 36).

3. There were ordinary and usual precautions which the Stevedore, in exercise of reasonable care, could have taken to correct the conditions and render the work area safe.

Keeler, an expert witness with approximately 26 years' experience (38), testified to the usual custom of a Stevedore to place a flooring of dunnage or pallets for the longshoremen to work upon when they find broken or defective dunnage in a hatch (39). There was no expert testimony to the contrary.

4. The Stevedore did not take reasonable precautions to correct conditions and render the area where the men worked safe.

DiCostanzo, the 16 year old hatch boss, admitted that he did not do anything to remedy the conditions but merely told his men to "watch yourselves" (37).

5. The failure to take such reasonable precautions rendered the working area unsafe and was the cause of the accident to Parenzan.

The testimony of the hatch boss, DiCostanzo, and the expert, Keeler, showed that there was a danger to the men working which the Stevedore could, and should have corrected, and which would have prevented the accident (37, 39, 40).

The Stevedore made no demand that the jury decide any other issues than those submitted to it. The Stevedore made no motion for a directed verdict. The only motion it made

at the trial was one to dismiss and the single ground urged was a claimed lack of evidence to show any negligence on the part of the Stevedore (42). The Stevedore was content to go to the jury on this sole ground and did not request that a special question or interrogatory be propounded to the jury regarding whether the Shipowner was negligent or the character of the Stevedore's negligence as compared with the Shipowner's. It did not ask the court to rule on such a question as a matter of fact or of law. No motions were made where the subject was even mentioned. The only motion made by petitioner was (42):

> "Mr. Bayer: If your Honor please, the third party defendant moves to dismiss the complaint of the third party plaintiff on the ground that there is no actionable negligence shown on the part of the defendant and indeed no negligence shown at all, sir."

The petitioner complains on page 10 that the trial court refused to formulate questions for the jury respecting the Shipowner's duties as compared with those of the stevedoring company. It also complains that there were not enough findings to support a verdict and refers to *Hodges* v. *Eastern*, 106 U. S. 408.

The petitioner fails to point out, however, that it did not ask that any questions on any further subjects be submitted to the jury. The petitioner also fails to state that *Hodges* v. *Eastern*, 106 U. S. 408 expresses a rule which is no longer the law. It has been supplanted by Rule 49 (a) of the Rules of Civil Procedure.

Under Rule 49 (a) of the Rules of Civil Procedure, which govern this proceeding, each party waives its right to a trial by jury as to any issue not submitted to the jury unless he demands its submission. In the absence of such a demand, the judge is permitted to make such a finding

and if the court fails to expressly do so, then "it shall be deemed to have made a finding in accord with the judgment on the special verdict".

The Stevedore did not make any demand that the jury decide any other issues than those submitted to it and the sole issue it demanded be submitted is: Was the Stevedore guilty of any negligence. The court, therefore, was privileged to make such findings and, in the absence of such findings, was deemed to have made those findings in accordance with the judgment. This means that the court necessarily found that the steamship company had not been guilty of active negligence or, indeed, of any negligence, but, on the contrary, had been liable to Parenzan solely on the basis that the unfit dunnage made the vessel unseaworthy—liability without fault. This is in accordance with finding No. 1 of the jury that the defective dunnage was the cause of Parenzan's accident.

It also means that the court found that the stevedoring company had breached its contract (warranty) with the Shipowner that it would perform the work in a competent and proper manner. The court had, in fact, charged the jury that such a duty was owed the Shipowner under the contract (61, 63). The Stevedore did not except.

The Circuit Court sustained the judgment on that ground, as well as on the ground that the Stevedore's belated contentions regarding active and passive negligence were not well founded.

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Although questions of active and passive negligence are now irrelevant, because of this court's recent decision in the *Weyerhauser SS. Co.* v. *Nacirema Operating Co., Inc.*, ... U. S. ....., March 3, 1958* the petitioner still urges the matter in his petition. It is, therefore, necessary for the respondent to show here not only that the Stevedore did not make or save the point at the trial but that the ruling of the trial court and the circuit court on the subject was correct under the law as it stood at the time of the trial. The Stevedore should not be heard to complain here that it was wrong, particularly in view of the fact that the Stevedore was properly held liable for breach of its contractual warranty to perform its work in a reasonably, safe and competent manner.

Since the Stevedore made no motion for a directed verdict, the sufficiency of the evidence is not before the court. *Rotondo* v. *Isthmian Steamship Co.*, 243 F. 2d 581 (CA 2 1957); *Harriman* v. *Midland Steamship Line*, 208 F. 2d 564 (CA 2 1953).

Furthermore, in the only motion made by the Stevedore at the trial, *i.e.*, one to dismiss, the single ground urged

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*"In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of "active" or "passive" as well as "primary" or "secondary" negligence is inappropriate. *Ryan Stevedoring Co.* v. *Pan-Atlantic SS. Co*, *supra*, at 132-133."

was claimed lack of evidence to show any negligence by the Stevedore. The Stevedore was content to go to the jury on this ground alone and did not request that an interrogatory, regarding whether the Shipowner was negligent or the character of the Stevedore's negligence compared with the Shipowner, be submitted to the jury. Nor did it ask the court to rule as a matter of law on the question. No motions were made where the subject was even mentioned (42). In view of this position taken before the trial court, the question now raised by the Stevedore regarding claimed active negligence by the Shipowner and passive negligence by the Stevedore, is not reviewable upon appeal. *Jones Truck Lines* v. *Argo*, 237 F. 2d 649 (C. A. 8, 1956); *Stilwell* v. *Hertz Drivurself Stations Inc.*, 174 F. 2d 714 (C. A. 3, 1949); *Maryland Casualty Co.* v. *Talley*, 115 F. 2d 807 (C. A. 5, 1941); *Gardner* v. *Darling Stores Corporation*, 242 F. 2d 3 (C. A. 2, 1957).

But even if the Stevedore had raised the issues of the character of the Shipowner's liability and the relation between it and the negligence of the Stevedore, the proof shows that the Shipowner had been only passively negligent but the Stevedore had been actively negligent.

In the instant case, the Stevedore had full knowledge of the conditions in the hatch and still permitted Parenzan to work there. Such actions by the Stevedore, who was in charge of the cargo discharge operation, made it guilty of active negligence and required it to indemnify the Shipowner.

In *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9, 1950). the Shipowner had supplied the Stevedore with a defective winch which the Stevedore continued to use with knowledge of the defect until a longshoreman was injured. In allowing the Ship-

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owner full indemnity from the Stevedore, the court stated (p. 182):

> "It is clear that both the United States and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. With this knowledge Rothschild should not have permitted Dillon (the injured man) to work in this dangerous circumstance as to which it was fully informed." (Matters in parentheses supplied.)

In *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314 (1952), a Shipowner, which was in possession and control of its vessel, was held liable to a longshoreman, who was working aboard the vessel, for a condition of the cargo which was due to a defect in the containers. Nevertheless, the Shipowner was held entitled to recover against the Stevedore-employer of the plaintiff because the Stevedore had failed to warn its employees, including the plaintiff, of the dangers from the leaking containers. This right of indemnity was decreed despite the fact that the Shipowner also had a duty to warn the same employees.

In discussing the right of indemnity, the Court of Appeals stated (p. 328):

> "The right to indemnity, as distinguished from contribution, is not dependent upon the legislative will. It springs from contract, express or implied, and full, not partial, reimbursement is sought. Where several tortfeasors are involved an implied contract of indemnity arises in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. The actively negligent tortfeasor is considered the primary or principal wrongdoer and is held responsible for his negligent act not only to the person directly injured thereby, but also to any other

> person indirectly harmed by being cast in damages by operation of law for the wrongful act. Whether negligence is passive or active is, generally speaking, a question of fact for the jury."

In the course of its opinon in the *McFall* case, the New York Court of Appeals noted that the fact that both parties may be guilty of negligence as respects the person injured does not mean that they are in *pari delicto* as to each other.

In the *McFall* case, the Court of Appeals also said, after citing numerous cases (p. 330):

> "• • • None of those cases is vitally different from the present case In all of them a plaintiff recovered against a person, such as Belgian Line, who is under a non-delegable duty to furnish a safe place to such plaintiff but in each case the primary and affirmative wrong was occasioned by the defendants against whom indemnity was sought and indemnity was permitted. • • •"

In the instant case, the only active or affirmative act which caused Parenzan's injury, as found by the jury, was that of the Stevedore in permitting him to start and to continue work in an area known to be dangerous. Because of such action on its part, the Stevedore was required to indemnify the Shipowner.

It must be borne in mind that there was no proof offered at the trial to show that the Shipowner had any knowledge of the defective dunnage prior to the accident. Here again, counsel by argument rather than proof has attempted to supply this all important missing piece in the necessary chain of defense. However, arguments or assertions of counsel are no substitute for evidence. If the Stevedore had any such evidence it should have presented it at the trial and not attempted to establish it by counsel's argument on an appeal.

As the Stevedore was guilty of active negligence in permitting Parenzan to work in a known dangerous area, the judgment should be affirmed.

Petitioner has sought to suggest that this case falls within the class of cases where the shipowner has failed to correct or to warn the stevedore company of a latent dangerous condition known to the shipowner and unknown to the stevedoring company. The petitioner cites (p. 9, petitioner's brief) this court's language in the recent case of *Weyerhauser S. S. Co.* v. *Nacirema Operating Co., Inc.*, U. S. , March 3, 1958, as hinting that the shipowner could not recover from the stevedoring company in such a case.

However, the case at bar is not such a case. Here the condition was not latent, nor was it unknown to the stevedore. The jury expressly found that the stevedore foreman knew of the condition during the two hours before the accident.

The following question was presented to the jury and answered as follows:

> "Q. If your answer to question 1 is Yes, did the defendant, International Stevedoring Company, through its hatch foreman, Di Costanzo, know as the unloading of the cases progressed from 8:30 to 10:00 a. m., that defective or unfit dunnage had been used? A. Yes."

The petitioner had contended earlier in the trial that it had no notice of the frail dunnage condition, and made a motion to dismiss on that ground. However, it did not move for a directed verdict on that ground, and as the Circuit Court in its opinion pointed out, it waived its point by such omission (251 F. 2d 928, 930). In any event, the point was put at rest by the jury's finding.

Question Presented.

The question presented by this petition is actually far different from that set forth in the stevedore's petition on page 2. The question set forth by petitioner completely ignores the fact that respondent in its third party complaint sought indemnity because of the stevedore's breach of its contractual warranty to conduct the work in a competent and safe manner. In fact the "question presented" by the stevedore implies that no such claim was made. Here, the jury found, and its findings were supported by ample evidence, that Parenzan's accident was caused by defective dunnage; that the stevedore's hatch boss knew of the defect; that there were ordinary and usual precautions which a stevedore in the exercise of reasonable care should have taken to correct the condition and make the work area safe; that the stevedore did not take such reasonable precautions and that the failure to do so was the cause of Parenzan's accident.

"The question presented" by the petitioner also ignores the fact that because of the position taken by it in the trial court, it may not now raise the issues of the negligence of the Shipowner nor, if the Shipowner was negligent, the character of its negligence as compared to that of the stevedore's.

The actual question presented to this court may more correctly be stated to be: Where a longshoreman is injured as a result of defective dunnage and where the dunnage was known to be defective by his employer and where there are usual precautions which, in the exercise of reasonable care, might be taken by the employer to make the place safe but that the longshoreman's employer did not take such precautions and as a result of its failure, the longshoreman's injuries were caused, did such failure consti-

tute a breach of the employer's warranty to perform the stevedoring operation in a safe and proper manner so that the Shipowner is entitled to recover full indemnity.

The shipowner's right to recover for such breach of warranty is fully sustained by the Ryan and Weyerhauser decisions. The petition presents nothing new or worthy of this court's attention.

CONCLUSION.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE DENIED.

Respectfully submitted,

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